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No. 91-1879

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

ROSE ACRE FARMS, INC., PETITIONER

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Claims Court is the appropriate forum to resolve petitioner's claim for compensation assertedly due under the Takings Clause of the Fifth Amendment and 21 U.S.C. 114a and 134a(d).

2. Whether, under the Fifth Amendment and 21 U.S.C. 114a and 134a(d), petitioner must be compensated for losses allegedly incurred under regulations restricting the interstate movement of eggs and chickens linked to salmonella poisoning of humans.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-14a, is reported at 956 F.2d 670. The opinion of the district court, Pet. App. 15a-46a, is unreported.

JURISDICTION

The court of appeals entered judgment on February 10, 1992. Pet. App. 1a. The court of appeals denied a petition for rehearing on February 26, 1992.

Pet. App. 50a. The petition for a writ of certiorari was filed on May 22, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Petitioner Rose Acre Farms, Inc. challenges federal regulations restricting interstate movement of table eggs and chickens linked to salmonella poisoning in humans.

1. Salmonella enteritidis (salmonella) is a communicable disease that poses a serious threat to public health. In healthy adults, salmonella can produce violent illness requiring hospitalization for severe fever, diarrhea, and vomiting. Pet. App. 1a. In elderly people, children, and persons with immune systems weakened from other diseases, it can be fatal. *Ibid.*

Contaminated eggs pose a particularly significant risk of causing salmonella in people. In theory, proper handling and cooking of eggs can prevent disease. In practice, that does not always happen. Some people continue to use raw eggs in caesar salads, hollandaise sauce, and other dishes that are prepared in ways that will not kill the bacteria. In other instances, the eggs are simply mishandled, improperly stored, or inadequately cooked. Pet. App. 2a.

The health risks are compounded in nursing homes, cafeterias, hotel kitchens, restaurants, and other places where food is prepared in large quantities. In these institutional settings, many eggs may be pooled together. As salmonella multiplies rapidly, the bacteria from a single infected egg can contaminate the entire dish. Pet. App. 2a. Thus, in a very literal sense, it takes only one bad egg to make hundreds of people seriously ill.

In recent years, there has been a sharp increase in the incidence of salmonella food poisoning. Scientific studies indicate that the increase may be linked to the development of an unusually invasive strain of salmonella that may be causing chickens to lay eggs that are contaminated with salmonella before the eggs shell is even formed. Pet. App. 2a. Such infections pose substantial risks for public health and the poultry industry. If chickens are laying eggs that are contaminated with salmonella before the shell is even formed, more contaminated eggs will enter the marketplace and more people will be placed at risk of contracting salmonella. And if a more invasive strain of salmonella is responsible for the upswing in salmonella outbreaks, then the spread of the bacteria from one poultry flock to another would multiply economic losses for the entire poultry industry.

2. Several overlapping statutory provisions vest the Secretary of Agriculture with broad authority to combat communicable diseases of livestock and poultry. The Secretary has the authority to "make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry." 21 U.S.C. 111. He is similarly authorized to "control and eradicate any communicable diseases of livestock or poultry." 21 U.S.C. 114a; see also 21 U.S.C. 120, 123, 134a.

On February 16, 1990, the Secretary invoked these remedial powers and determined that emergency regulatory measures were necessary to identify chicken flocks infected with salmonella and to control the spread of the disease. 55 Fed. Reg. 5576 (1990). The Secretary noted that salmonella infection was preva-

lent among northeastern and mid-Atlantic flocks, and spreading to other flocks in midwestern and northwestern states. 55 Fed. Reg. 5580 (1990). Citing public concerns about egg safety and the growing number of salmonella outbreaks in people, the Secretary stated that immediate regulatory action was necessary to prevent harm to the poultry industry and the public. *Ibid.* He accordingly published interim regulations, effective immediately and in advance of public comment, to identify infected flocks and to control the spread of the disease to poultry and people.[1]

The regulations establish a three-step process for determining whether chicken flocks pose a risk of spreading salmonella infection. State and federal investigators first determine whether eggs are the probable cause of a reported outbreak of salmonella in humans. If eggs are implicated in the outbreak, they are then traced back through the chain of distribution to the laying flock. That flock is designated a "study flock." 56 Fed. Reg. 3740 (1991).

Investigators then test for salmonella in the study flock's environment by analyzing samples from the manure and egg transport machinery of each poultry house within the flock. If salmonella are recovered from the samples, the flock is designated a "test" flock and subjected to additional testing. Eggs, chickens, and articles associated with the production process (such as feed and chicken coops) may not be freely shipped in interstate commerce while this additional testing takes place. However, eggs subject to these restrictions may move in interstate commerce

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[1] After a subsequent notice and comment period, the Secretary promulgated final regulations on January 30, 1991. See 56 Fed. Reg. 3730 (1991), codified at 9 C.F.R. 82.30-82.38.

if destined for pasteurization, hard boiling, or foreign export. 56 Fed. Reg. 3740-3741 (1991).

In the final stage of the testing process, blood and internal organs are taken from a sample of chickens within the "test" flock and analyzed for the presence of salmonella. If the salmonella analysis of blood and internal organ samples is negative on two successive occasions, the affected flock or poultry house is released from further restrictions. If the tests are positive for salmonella, however, then the flock or house is designated as "infected." The restrictions on interstate commerce will then remain in effect until the houses have been depopulated, cleaned, washed, and disinfected in accordance with federal guidelines or until further testing indicates salmonella are not present in organ samples. To guard against reinfection, a house or flock that is released from infected status remains subject to further testing for a period of 18 months, unless the egg producer is participating in a voluntary program of salmonella control that has been approved by the Secretary. 57 Fed. Reg. 776, 779 (1992).

3. The Secretary has statutory authority to provide monetary compensation to livestock and poultry producers who incur economic losses as a result of regulatory actions undertaken to prevent the spread of communicable diseases. Section 114a of Title 21 provides that the Secretary's power to control and eradicate communicable diseases of poultry includes authority for "the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe." Similarly, Section 134a(d) of Title 21 provides that, with exceptions not relevant here:

> the Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section [*i.e.* 21 U.S.C. 134a]. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof.

The Secretary concluded that neither provision warranted payment of compensation to producers whose eggs and chickens were subject to restrictions under the salmonella regulations. 56 Fed. Reg. 3731 (1991). The Secretary noted that the applicable statutes require payment of compensation if the government orders *destruction* of animals or animal products. *Ibid.* He also noted that the statutes and regulations in some cases permit compensation if owners voluntarily destroy animals or animal products to further a regulatory program aimed at limiting communicable diseases. *Ibid.* The Secretary determined, however, that destruction of chickens was not necessary to further the goals of the salmonella program. *Ibid.* He explained that salmonella bacteria could not be eradicated by destroying affected chicken populations, principally because the bacterial agent is not host specific, but is, instead, found in many other species throughout the environment. *Ibid.* Accordingly, the salmonella program did not seek to eradicate the disease, but was instead intended only to control the spread of salmonella in egg-type breeding and production flocks—a goal that in the Secretary's judgment could be furthered through actions short of ordering destruction of the affected flocks.

In addition, the Secretary explained that indemnity payments were reserved for instances in which the nature of the disease or the federal regulatory action

causes severe and widespread economic impact on the affected agricultural industry. 56 Fed. Reg. 3731 (1991). The Secretary determined that such circumstances were not present here because: (1) the disease does not cause severe mortality or reductions in productivity in affected flocks; and (2) the regulatory scheme mitigated the economic impact on producers by permitting restricted eggs to be sold in other markets and by limiting the restrictions to separate, individual poultry houses within the larger flock. *Ibid.*

4. Enforcement of these regulations linked petitioner's chicken farms to three outbreaks of salmonella poisoning. In Chicago, 400 otherwise healthy adults contracted salmonella while attending a convention. More than 100 required hospitalization. State and local health investigators concluded that eggs from petitioner's White County farm were the probable source of the illness. Pet. App. 19a. Petitioner's eggs were also linked to a salmonella outbreak that felled 42 wedding guests in Kentucky, and to a third salmonella outbreak among two Tennessee families. *Id.* at 19a-20a. Poultry houses at three of petitioner's farms were eventually found infected with salmonella, and a portion of petitioner's production was barred from the interstate table egg market. *Id.* at 18a-20a.

On December 28, 1990, petitioner filed a complaint in district court for a preliminary injunction and for a declaratory judgment invalidating the regulatory scheme. The district court, after consolidating the preliminary injunction hearing with a trial on the merits, held that the regulations are legally defective because they deny egg producers compensation for economic losses. Pet. App. 48a. The court

first rejected respondents' contentions that the Claims Court has exclusive jurisdiction over petitioner's claims that the statute and the Fifth Amendment require monetary compensation for economic losses caused by the regulatory scheme. *Id.* at 38a-39a. The court acknowledged that petitioner provided evidence of losses of $50,000 per day and that claims for such compensation could be brought only in the Claims Court. *Id.* at 38a. The court reasoned, however, that the complaint did not in fact seek money damages but only demanded a declaratory judgment to the effect that compensation would be required under the applicable statutes and the Takings Clause of the Fifth Amendment. *Id.* at 38a-39a. The court therefore assumed equitable jurisdiction.

On the merits, the district court held that 21 U.S.C. 114a and 134a both require payment of compensation. The court reasoned that the regulations effect a condemnation of restricted eggs and chickens by destroying their economic value—a result that, in the district court's view, was tantamount to the destruction of the chickens and eggs, and that therefore triggers a statutory obligation to provide compensation for government-ordered destruction of animals and animal products. Pet. App. 44a-46a. In addition, the court reasoned that the administrative record and trial testimony indicate that the salmonella regulations could have a severe effect upon the poultry industry, and that the Secretary's decision not to provide compensation in light of such economic injuries was arbitrary and capricious. *Ibid.* The court concluded that, in the absence of a provision for indemnification, the regulations violate applicable statutes and the Fifth Amendment. *Id.* at 46a. It also found that that the Secretary might not have

established the entire regulatory scheme if obligated to provide compensation. *Id.* at 45a. Consequently, the court found that a defect in the indemnification provisions of the regulation would be fatal to the entire regulatory scheme. On that basis, the district court declared the entire regulatory scheme invalid and barred the Secretary from imposing any restrictions on Rose Acre's shipment of eggs from flocks that have previously been linked to salmonella poisoning of humans. *Id.* at 46a, 48a-49a.

5. The court of appeals reversed. Pet. App. 1a-14a. It held that the district court, in invalidating the regulatory scheme for failure to provide compensation, had imposed a remedy that did not fit the alleged violation. The court reasoned that, if pertinent statutes or the Constitution in fact require compensation, then the appropriate remedy is to order compensation paid—relief that in this case could only be afforded by the Claims Court. *Id.* at 5a-8a.[2] The court thus held that petitioner had brought its claims concerning an asserted right to compensation in the wrong forum. *Id.* at 8a. The court therefore did not reach the merits of petitioner's claims that the pertinent statutes and the Takings Clause required payment of compensation for damages caused by the salmonella regulations. *Id.* at 6a, 14a.[3]

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[2] The court of appeals recognized that, under 28 U.S.C. 1346(a), district courts do have jurisdiction to award less than $10,000 against the United States. Pet. App. 5a. It indicated, however, that petitioner's claims would exceed that amount and thus could be entertained only by the Claims Court. *Ibid.*

[3] The court of appeals also held that the Secretary has authority to regulate animal diseases that pose a greater health risk to humans than to the animals themselves; that

ARGUMENT

1. Petitioner principally argues that the court of appeals erred by usurping the Secretary's discretion to evaluate the costs and benefits of the regulatory scheme, Pet. 12-16, and by misapplying the law on whether an invalid regulatory provision may be severed from other provisions of the challenged regulatory scheme, Pet. 16-20. Petitioner thus asserts that, since the current regulatory scheme was adopted on the assumption that compensation would not be paid to regulated producers, a reviewing court, on determining that compensation should be paid, must set aside the entire regulatory scheme in order to ensure that the Secretary retains the authority to make congressionally delegated policy and regulatory determinations.

Those arguments rest on a fundamental misunderstanding of the holding below and focus on issues that are neither ripe for review nor fairly implicated by the court of appeals' decision. The court of appeals ruled that petitioner's claimed entitlement to monetary compensation could be entertained only by the Claims Court. Pet. App. 8a. The court of appeals therefore explicitly declined to decide whether the pertinent laws or the Takings Clause require compensation. *Id.* at 6a, 14a. It is therefore odd for petitioner to claim that the decision below improperly divests the Secretary of authority to determine whether the salmonella regulations should remain in force if the government must pay compensation, since

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the Secretary's regulations set forth a rational means of addressing the health risks posed by eggs contaminated with salmonella; and that the regulations requiring environmental monitoring of poultry houses located on the same premises as an infected house are lawful. Pet. App. 8a-13a. Petitioner has not challenged those rulings in this Court.

the court of appeals did not rule that compensation is necessary, and its holding *precludes* the district court from even entertaining the question in the circumstances of this case.

The court of appeals did state in a brief dictum that if compensation were deemed required it would be "inappropriate to halt the regulatory program." Pet. App. 7a. But as no court has in fact made such a determination, issues concerning whether the court must invalidate the entire regulatory scheme or instead sever the "no compensation" administrative determination are not ripe for review. Consequently, the principal issues raised by the petition for a writ of certiorari are not implicated by the holding below and do not merit review by this Court.[4]

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[4] While the issue is not presented by the holding below, we note that the court of appeals was correct in stating that it would be inappropriate to invalidate the entire regulatory scheme if the statutes or the Constitution were found to require compensation. This Court has held that "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 321 (1987). Thus, the court of appeals was correct in suggesting that a determination that the Constitution requires compensation would not afford any basis for invalidating the entire regulatory scheme.

Principles governing the severability of regulatory provisions direct the same result with respect to petitioner's claim that the salmonella regulations misconstrue statutory provisions governing compensation. Regulations should ordinarily be treated as severable unless: (1) there are affirmative indications of a contrary intent; or (2) severing the defective provision would impair the functioning of the underlying statute. *K Mart Corp.* v. *Cartier Inc.*, 486 U.S. 281, 294 (1988). Contrary to petitioner's contentions, the administrative record does not demonstrate that the Secretary would not

2. The ruling below that petitioner's compensation claims may be entertained only by the Claims Court is consistent with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, the Court made clear that, under 5 U.S.C. 704, the existence of a Tucker Act monetary remedy would, for certain claims, oust the district courts of the equitable review powers that are otherwise conferred by the Administrative Procedure Act (APA). The APA generally provides for review of agency action made reviewable by statute and for review of final agency action for which there is no adequate remedy at law. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). To that end, the APA specifically waives the United States' sovereign immunity from suits for equitable relief by providing that:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed * * * on the ground that it is against the United States [5 U.S.C. 702].

The APA, however, by its terms applies only where "there is no other adequate remedy in a court." 5 U.S.C. 704.

In *Bowen*, the Court held that 5 U.S.C. 704 excludes from APA review claims based on money mandating

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have undertaken this regulatory program if the government were required to compensate egg producers for economic loss. And even if a reviewing court were to conclude that compensation is required, the "no compensation" provision could be severed from the regulation without intruding upon the Secretary's discretion to determine, for subsequent cases, whether the regulations should remain in force.

provisions that: (1) fall within the Claims Court's Tucker Act jurisdiction; (2) "provide compensation for specific instances of past injuries or labors"; and (3) establish rights that can be fully redressed without resort to the type of injunctive and declaratory powers that have been withheld from the Claims Court, but that are generally vested in a district court. 487 U.S. at 900-901 n.31. The Court concluded that for such claims, "suits under the Tucker Act in the Claims Court offer precisely the sort of 'special and adequate review procedures' that [APA] § 704 requires to direct litigation away from the district courts." *Ibid.*

The compensation claims pressed by petitioner fall squarely within this category, for several reasons. First, the Tucker Act confers jurisdiction over petitioner's statutory and constitutional claims for compensation. Similar claims have been routinely adjudicated by the Claims Court and its predecessor, the Court of Claims. See, *e.g.*, *Julius Goldman's Egg City* v. *United States*, 697 F.2d 1051 (Fed. Cir. 1983); *Loftin* v. *United States*, 6 Cl. Ct. 596 (1984), aff'd, 765 F.2d 1117 (Fed. Cir. 1985). Second, the provisions of law on which petitioner relies—the Takings Clause and 21 U.S.C. 134a(d)—provide a right to indemnification for a specific past injury: monetary loss resulting from the destruction of animals or related products pursuant to an order issued under the Secretary's regulatory authority to control communicable diseases. They are money-mandating provisions that authorize compensatory relief for past injuries—precisely the type of laws identified in *Bowen* as falling within 5 U.S.C. 704. See 487 U.S. at 900-901 n.31, 905-906 n.42.

Third, a monetary remedy in the Claims Court is sufficient to afford complete redress for the compensa-

tion rights conferred by the Constitution and the laws. *Bowen* suggests that, in some circumstances, the need for prospective relief governing the relationship between the federal government and other parties would render the Claims Court remedy inadequate. 487 U.S. at 905. But the Claims Court could provide an adequate remedy for all petitioner's claims for compensation. The Claims Court, for example, can supply a fully adequate remedy for petitioner's Takings Clause claim. In fact, this Court has held that equitable relief is not available where a suit for compensation can be brought against the government, *Ruckelshaus* v. *Monsanto*, 467 U.S. 986 (1984), and a compensation remedy under the Tucker Act for a taking is presumed to be available unless there are unambiguous indications to the contrary, *Preseault* v. *ICC*, 494 U.S. 1 (1990). Accordingly, an award of compensation by the Claims Court for petitioner's takings claim is not just an "adequate" remedy, it is the only remedy made available by Congress.

The Claims Court could also provide a fully adequate remedy for petitioner's statutory compensation claims. In many respects a money judgment from the Claims Court affords a *superior* remedy to the declaratory relief sought by petitioner. The Claims Court has long experience and special expertise in valuing money claims against the government, and it can enter a money judgment disposing of the *entire* case. A declaratory judgment, in contrast, leaves the critical question of the amount of compensation actually due unresolved, thereby raising the possibility that complete resolution of petitioner's claims would not be achieved until it exhausts a second, duplicative round of judicial review.[5]

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[5] Petitioner has in fact filed a complaint in the Claims Court seeking an award of compensation for losses allegedly in-

3. The decision below does not conflict with the cases cited by petitioner. Neither case involved the laws or programs at issue here; nor do they reflect any disagreement about the proper application of the jurisdictional principles set forth in *Bowen* v. *Massachusetts*.

Esch v. *Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), involved the Secretary of Agriculture's decision partially to suspend a farmer's participation in a farm subsidy program. The court held that suit challenging the suspension could be brought in district court. The court found that plaintiff's claim was not predicated on a statute mandating monetary compensation for past injuries and also did not clearly fall within the Claims Court's jurisdiction. *Id.* at 984-985. Thus, unlike this case, *Esch* involved claims that could not be adequately redressed under the Tucker Act. *Zellous* v. *Broadhead Associates*, 906 F.2d 94 (3d Cir. 1990), is distinguishable for similar reasons. There, the court of appeals held that a claim for money assertedly due under a federal housing assistance program could not be characterized as a claim for monetary damages. *Id.* at 96-100. The court held that, although the claim sought an order directing the United States to pay out money, district court review under 5 U.S.C. 702 was not foreclosed by the requirement of 5 U.S.C. 704 that there be "no other adequate remedy in a court." 906 F.2d at 99.

4. Petitioner repeatedly asserts, without explanation or supporting argument, that the regulatory decision against paying compensation is erroneous and unlawful and renders the regulations invalid in their

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curred under the salmonella regulations. *Rose Acre Farms, Inc.* v. *United States*, No. 92-335 C (Cl. Ct.) (filed May 8, 1992).

entirety. Pet. i, 10, 13, 16. As explained above, the court of appeals correctly determined that this claim must be raised in the Claims Court and accordingly did not reach the issue. In any event, petitioner's claim lacks merit.

Petitioner's assertion, Pet. 11-12, 15, that the Secretary has a statutory duty to compensate producers who are adversely affected by the salmonella control program is flawed at every turn. First, petitioner errs in asserting that 21 U.S.C. 134a affords the only statutory authority for imposing restrictions on the shipment of eggs or chickens that carry an infectious disease. Congress, in 21 U.S.C. 111, 114a, and 120, has provided the Secretary independent authority to control and eradicate communicable diseases of poultry without regard to the adequacy of state disease control measures and without ordering the physical destruction of animals and animal products.

Second, the administrative record shows that the Secretary had ample basis for imposing regulatory restrictions that stopped short of ordering the actual physical destruction of infected eggs and chickens. Petitioner implies that the Secretary irrationally declined to direct the destruction of infected chickens in order to avoid the mandatory compensation provisions of 21 U.S.C. 134a(d). The Secretary, however, expressly determined that: (1) restrictions on interstate shipments of potentially infected eggs and chickens were adequate to prevent the spread of disease; (2) a program of mandatory destruction would not provide significant additional protection in light of the prevalence of salmonella in the environment and the mode of disease transmission; and (3) the economic impact on the industry would be ameliorated by the availability of alternative markets, the rela-

tively limited scope of the regulatory restrictions, and increased consumer confidence. 56 Fed. Reg. 3731 (1991). The salmonella regulations thus reflect a reasoned choice of regulatory alternatives that is well within the Secretary's discretion.

Finally, regulatory restrictions that permit egg production to be sold for pasteurization, hard-boiling, or foreign export do not "destroy" chickens and eggs or otherwise give rise to a right to compensation under the pertinent statutes. The indemnification provisions at issue, 21 U.S.C. 114a and 134a(d), explicitly make indemnification contingent on the actual "destruction" of animals or animal products. The ordinary meaning of the term generally is "to ruin completely" or "[t]o ruin the structure, organic existence or condition of a thing; to demolish; to injure or mutilate beyond possibility of use." *Black's Law Dictionary* 449 (6th ed. 1990); see also *Webster's Third New International Dictionary* 615 (1986). If, as petitioner implies, Congress had intended to make producers whole for any economic loss incurred in a disease control program, Congress would have said so expressly. The plain text of the statutes, however, authorizes compensation in far narrower circumstances that do not apply to this case.[6]

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[6] In passing, petitioner claims that the regulations violate the Fifth Amendment. Pet. i, 13 n.10. That claim does not warrant reivew by this Court. As an initial matter, petitioner has not adequately preserved that claim. The Questions Presented do not ask the Court to review such a claim; the petition does not discuss or even make reference to any of this Court's Takings Clause cases; and the assertion that the Constitution requires compensation is unsupported by argument or legal explanation. The court of appeals also did not address that claim, and this Court should not do so in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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